JD(SF)–30–04
Chula Vista, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

ATC/VANCOM OF CALIFORNIA, L.P.

and Case 21–CA–35492

SAN DIEGO BUS DRIVERS UNION, LOCAL 1309,
AMALGAMATED TRANSIT UNION, ALF–CIO, CLC

Sonia Sanchez, Atty., Los Angeles, CA
for the General Counsel.
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for Respondent.
Richard D. Prochazka, Atty.
San Diego, CA, for Charging Party.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. This proceeding arises from charges filed by San Diego Bus Drivers Union, Local 1309, Amalgamated Transit Union (Union or Charging Party) on December 4, 2002[1], and amended on December 9, against ATC/Vancom (ATC/Vancom, Company, or Respondent). Based on those charges, the Regional Director for Region 21 issued a complaint on April 13, 2003, alleging that ATC/Vancom violated Section (8)(a)(1) of the National Labor Relations Act (Act) by directing employees to sign a union decertification petition, promising employees pay increases and other benefits if they would abandon support for the union, and threatening employees that they would not receive pay increases if they did not abandon support for the Union. The complaint further alleges that the Company violated Section 8(a)(1) and 8(a)(5) of the Act by unilaterally changing its access policy under which a union representative could enter a portion of the maintenance area to conduct union business by requiring the Union agent to first seek and obtain permission before entering that area.

I heard this case in San Diego, California, on November 4, and December 9, 2003. Having now carefully considered the entire record[2] and the demeanor of the witnesses, and

[1] All further dates refer to the 2002 calendar year, unless otherwise noted.

[2] In its brief, Respondent requests reconsideration of rulings I made at the hearing concerning the admissibility of five exhibits. Having now reconsidered those exhibits, I find that Respondent's Exhibit 32 should have been received and it hereby is received in evidence. My rulings as to Respondent's Exhibits 1, 31, 33, and 34 remain unchanged.

after considering the briefs filed by all parties, I have concluded General Counsel has proven that Respondent violated the Act in certain respects but not others based on the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with a facility located in Chula Vista, California, operates a local transit system in and around the San Diego metropolitan area. This case involves only its Chula Vista facility. ATC/Vancom annually derives gross revenues in excess of $250,000, and purchases and receives at its Chula Vista facility goods valued in excess of $50,000 shipped directly from locations outside the State of California. Based on the foregoing, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as Respondent admits, and that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve this dispute. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The facility involved here is located at 3650 Main Street in Chula Vista, a San Diego suburb. The facility consists of a building and a yard for parking its busses when not in use. The building is essentially divided between the maintenance area and the drivers' area. The latter includes the company's general offices, a dispatcher's office, and a drivers' lounge with tables and vending machines. This area is separated from the maintenance area by a set of glass doors. At relevant times, the mechanics' break area was located immediately behind those doors. To the right of the mechanics' break area (assuming an approach from the drivers' area) is a hallway leading out of the building. The mechanics' time clock and bulletin board are located on the far wall of the hallway between the mechanic's break area and entrance to the maintenance director's office. An exit leading to the parking lot is located at the end of the hallway beyond the maintenance director's office. Due to certain remodeling during relevant times, the mechanics' vending machines were relocated to the driver's break area.

Although mechanics are permitted in the drivers' area, Respondent prohibits drivers from entering the maintenance area, a policy set forth in memoranda distributed at safety meetings and by signs posted on the glass doors leading to the shop area. Respondent has designated the area near a rear entrance to the maintenance area as the "smoking area" for use by both the drivers and the mechanics.

For the past two years, Dwight Brashear has served as the general manager at Chula Vista and Andy Mikkelson served as the operations manager. Brashear has overall management responsibility for the facility. Brashear succeeded Don Kilner as the general manager when Respondent moved Kilner to another location. Mikkelson's responsibilities include handling all disciplinary matters involving the drivers, and scheduling drivers' shifts and routes. He usually works from 8:00 a.m. to 5 p.m., Monday through Friday. Ordinarily, he spends at least one and a half hours per day in the drivers' break room talking with drivers before and after they complete their shifts. Ralph Ayala has been ATC/Vancom's director of

maintenance at Chula Vista for the past 12 years.[3] He oversees the maintenance shop and supervises the mechanics working work there.

Since July 1999, the Union has been the exclusive bargaining representative of the following bargaining unit of Respondents' employees:

> All full-time and part-time bus drivers, extra board drivers, mechanics and service workers, employed by the Employer in and out of its facility located at 3650-A Main Street, Chula Vista, California; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

At the relevant times, Ricardo (Richie) Ahumada, a bus driver employed by the Company for about 12 years, served as the unit employees' principal conduit to the Union. Before becoming a Union executive board member in September 2000, Ahumada served as the Union's shop steward. After he became an executive board member, his Union-related duties expanded to include representing the unit employees, assisting with contract negotiations, policing the agreement; and responding to problems the bargaining unit employees had regarding Union issues. Shortly thereafter, in December 2003, Ahumada negotiated a verbal understanding with then General Manager Kilner that permitted him access to that portion of the maintenance department that included the break area and that portion of the hallway around the mechanics' time clock and bulletin board. This access agreement permitted Ahumada to conduct Union business with mechanics on breaks and to inspect the time clock and bulletin board for information relevant to Union business. In November 2002, Ahumada's scheduled driving hours were typically from 5 a.m. to approximately 3:45 p.m.

The parties most recent collective–bargaining agreement around the time of the events involved here was effective for a term from July 1, 1999, through June 30, 2002. When that agreement expired, the parties signed an agreement to extend the contract until a new agreement could be reached. To that end, they negotiated periodically from July through October 2002. By the end of October, the parties had reached agreement on some subjects, including full retroactivity of the wage provision if the employees accepted Respondent's final offer. The parties disagreed on other subjects including wages, health benefits and the number of unexcused employee absences (miss-outs) that would result in an employee's termination.

At the Company's insistence, the Union held a ratification meeting on October 30 that permitted members to vote to either accept or reject ATC/Vancom's final offer. This proposal provided for initial wage increases of over 40 percent for mechanics and less than 10 percent for the drivers and service workers in the first year of the agreement. Before the vote, the Union prepared and distributed a Contract Summary document, listing the subjects on which the parties agreed, and both parties' positions on subjects on which they disagreed. In its Contract Summary, the Union strongly recommended that employees reject ATC/Vancom's final offer because of its concern that the Company's proposed wage increases would be offset by future increases in the cost of employee co-payments for health care.

Before the ratification vote, ATC/Vancom announced to its employees that if they rejected ATC/Vancom's final offer, its retroactive pay proposal would be "off the table." About

[3] At various places in the transcript, particularly for the proceedings held on December 9, Ayala's name is incorrectly spelled "Alaya." The transcript is hereby corrected to reflect the proper spelling of the Ayala name.

140 of the 215 unit employees voted during the ratification balloting. A majority rejected ATC/Vancom's final offer.

Almost immediately after the ratification outcome became known, considerable internal dissension broke out among the unit employees. The mechanics who stood to gain substantially by the approval of the Respondent's final offer appear to have been particularly upset. As a result, the mechanics began circulating a petition seeking to decertify the Union soon after the failed ratification vote. By late morning on November 6, the decertification movement had a sufficient showing to file an RD petition with the NLRB seeking a vote to oust the Union. On November 18, the parties to the NLRB decertification matter entered into an election agreement providing for a Board supervised election on December 12. In accord with established rules, the Regional Director postponed the election after the Union filed the charges in this case. Eventually, the Regional Director dismissed the RD petition after issuing this complaint.[4] Meanwhile, in February 2003, Respondent declared a bargaining impasse and implemented its wage proposal without retroactive pay. In July, the parties reached a new collective-bargaining agreement.

B. The Decertification Campaign

The allegations in this case grew out of the early part of the decertification campaign. On October 31, Ahumada posted the results of the ratification vote conducted the day before on the bulletin board at the Main Street facility. As he entered the hallway to the drivers' break room, he heard Mikkelson telling two drivers that the Union did not care if the drivers received retroactive pay increases and that the Union did not even want the drivers to vote on ATC/Vancom's final offer. When Mikkelson saw Ahumada he said, "Here comes Richie now – ask him why you weren't allowed to vote." The two drivers angrily confronted Ahumada demanding to know why the ratification meeting was held at a time when they were unable to attend. Ahumada apologized and explained that the Union tried to schedule the vote to accommodate as many employees as possible. Ahumada admits that at some point during the exchange, Mikkelson stated to the drivers present that the Company would no longer pay the retroactive pay as provided in its final, pre-ratification offer.

On November 5, several drivers at the Main Street facility told Ahumada that the unit mechanics were circulating a Union decertification petition. Early the following morning when Ahumada reported for work, he saw Dawn Ayala, a mechanic unrelated to the maintenance director, holding a piece of paper and overheard her trying to convince Don McClendon, an ATC/Vancom driver, to sign it. At the time, Ayala was in the drivers' break room during what Ahumada considered her working hours. He believed the dispatch supervisor saw Ayala and knew, but did not interfere, with her activities. After Ayala left, McClendon confirmed to Ahumada that she had the decertification petition. Dawn Ayala and McClendon did not testify.

Later that morning, Ahumada spoke with some drivers at the Iris Street Trolley station where various bus lines converge to transfer passengers to trolleys. During a break there, some drivers purportedly told Ahumada about the decertification petition and claimed that Mikkelson had been permitting drivers to enter the maintenance area to sign the petition.[5]

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[4] By the time of the hearing, the RD petitioner had become the Union's steward at the Main Street facility.

[5] Although Ahumada's prehearing affidavit executed in December of 2002 refers to his exchange with other drivers at the Iris Street Station, it contains no reference to Mikkelson allowing drivers to enter the maintenance area in order to sign the petition.

Later on November 6, Ahumada overheard Mikkelson tell several drivers at the Main Street facility that they should get rid of the Union and "if it didn't work out, the employees could bring the Union back in a year." Ahumada asked Mikkelson if he was telling the drivers to sign the decertification petition and promising them retroactive pay increases if they got rid of the Union.[6] Mikkelson initially responded that he was just answering questions and giving advice, and if the drivers asked where the petition was, he told them. Ahumada acknowledged that Mikkelson, later in the same conversation with the drivers, stated the corporate position was that there was no way employees would get retroactive pay once it had been rejected.

Ahumada claims that he overheard Mikkelson tell several drivers in the break room on November 7 that if they got rid of the Union, ATC/Vancom would honor the rejected contract and give the employees retroactive pay increases. Ahumada asked Mikkelson how he could promise the retroactive pay when the parties had not yet signed a contract. Mikkelson replied that the corporate office had authorized his statement.

In addition, Ahumada claims that around November 7, he noticed that the sign prohibiting drivers from entering the maintenance area was no longer posted on the glass doors leading from the drivers' area into the maintenance shop where it had been for several years. No evidence shows that Ahumada called this fact to the attention of any supervisor or manager. Ahumada purportedly made a note when he first noticed the missing sign on the mechanics' door but he claimed that a file full of notes he had made disappeared or were stolen from the Union office. According to Ahumada, a new sign prohibiting drivers from entering the maintenance area was posted in late November or early December.

Everett Arguilez has worked as a bus driver out of the Main Street Facility for five years and has been a Union member since shortly after his hire. Arguilez also claims that the sign on the glass doors leading to the maintenance shop had been removed but, according to his recollection, this occurred in late November or early December.

On November 11, Ahumada heard Mikkelson in the drivers' break room talking to several drivers. Ahumada told Mikkelson that he should stop making promises to the drivers. He asked Mikkelson if he was allowing drivers to enter the mechanics' area. Mikkelson purportedly responded by stating: "I just told them to go into the mechanics' area." Subsequently, Ahumada testified that Mikkelson told him he "wasn't telling people to go into the mechanics' area, but he was just telling people to see the mechanics."

On November 15, as he was leaving the Main Street facility, Ahumada heard Ralph Ayala, Maintenance Manager, tell two service workers (in Spanish) that they should give the Company another chance, and that ATC/Vancom would give them what the Company had offered the Union if they would just trust the Company. Ayala testified but did not deny making this comment.

On other dates during mid-to-late November, Ahumada claims that he heard Mikkelson tell groups of drivers in the break room that ATC/Vancom would give them retroactive pay increases, that they should get rid of the Union, and that they should give the Company a chance. Ahumada also claims that he heard General Manager Brashear tell drivers that the

[6] Ahumada's prehearing affidavit did not refer to confronting Mikkelson in this manner on November 6.

Union was "ripping them off" by charging monthly dues, that the Union did nothing but take their money, and that they should get rid of the Union.

During November 2002, Arguilez generally worked from about 4:00 a.m. until 1:00 p.m. On November 6, Arguilez returned to the Main Street Facility at the end of his shift to clock out as usual. As he approached the dispatch office, Arguilez heard Mikkelson telling several other drivers to go see the mechanics who had a paper they wanted the drivers to sign and that he could not say much more about it. According to Arguilez, Mikkelson told the drivers that if the employees "tossed the Union out," the rejected contract would "kick in" as of July 2002, and ATC/Vancom would give the employees retroactive pay increases. Soon after, one of the mechanics showed the petition to Arguilez in the smoking area but he declined to sign.

At the end of his shift on November 7, Arguilez went to the dispatch office, where two or three other drivers were present. He claims that he overheard Brashear say on this occasion that if they upset the Union, ATC/Vancom would pay them retroactively from July 2002, and if not, since they had voted to reject the contract, they would not receive retroactive pay. During another similar exchange, Arguilez overheard Mikkelson tell drivers that, while the current contract called for an employee's termination after six absences, drivers with good records would receive a letter that afforded them an additional absence before termination, if they accepted ATC/Vancom's offer.

David Haataja has been a driver for ATC/Vancom since 1999. In November 2002, his usual driving shift began at 1:15 p.m. Haataja lives in Tijuana, Mexico. Typically, he arrives at work quite early because he allows extra time for his commute in case of a lengthy delay at the border crossing. He passes any extra time before his shift starts around the drivers' lounge.

In early November, Haataja learned about the decertification petition. In the lounge with other drivers present, he asked Mikkelson about the decertification petition and Mikkelson told him it was in the maintenance department. Haataja heard Mikkelson tell other drivers that the petition was in the maintenance department on at least two other occasions. Mikkelson did not tell Haataja to sign the petition. Haataja did sign the petition in the smoking area without entering the off-limits maintenance area at all.

Haataja did not hear Mikkelson promise or threaten any employees in regard to support of the decertification petition. Nor did he hear from any employees that Mikkelson or Brashear had promised them retroactive pay increases if the employees voted the Union out. In response to employees' questions about ATC/Vancom's attendance policy, Haataja heard Mikkelson tell drivers that the policy would not change, whether employees voted the Union out or not.

Mikkelson claims that he first heard rumors going around the drivers' break room about maintenance employees circulating a decertification petition in early November. He claims that he told employees that the Company was not involved, and that he could not comment on it. In October or November 2002, Mikkelson, Brashear and Ralph Ayala received reviewed instructions from ATC/Vancom's attorney concerning lawful responses to employees about the decertification petition, and the Union in general. During that time, Mikkelson saw a group of drivers and mechanics in the smoking area near the maintenance repair bays. He assumed from later conversations that the group was in possession of the petition, although he did not see it at the time.

When Mikkelson was first asked by an employee what would happen if the Union was voted out, he asked General Manager Dwight Brashear how to respond to the question. At Brashear's direction, Mikkelson told employees that if they voted the Union out, the Company

would put its last best offer into effect, but without retroactive pay increases, because the employees had voted not to ratify the company's proposal on October 30. Mikkelson claims that at least 100 different drivers asked him what would happen if they voted the Union out and he provided the same answer to all of them. Mikkelson recalled having several conversations with drivers regarding the decertification petition but had no recollection of the drivers' names or the dates on which the conversations occurred. When drivers asked him if the attendance policies would change if they voted the Union out, Mikkelson claims that he told them no, that the policies were fair and effective, and he saw no reason to change them.

Mikkelson denied telling employees to vote the Union out. He also denied promising employees retroactive pay increases if they voted the Union out, directing employees to see the mechanics or to sign the decertification petition, and allowing or sending drivers into the off-limits maintenance area to sign the petition. He further denied telling employees the Company would make the attendance policy more lenient if the Union was voted out; or telling employees that if they did not vote the Union out they would not receive retroactive pay increases.

Mikkelson denied that he ever discussed putting the rejected contract proposal into effect with Ahumada. Similarly, he denied that Ahumada ever confronted him about statements he had or had not made to employees regarding the rejected contract, or the decertification petition. In addition, Mikkelson denied that the sign prohibiting drivers from entering the maintenance area had ever been removed. Had that been the case, Mikkelson claims that he would have replaced the sign immediately for safety reasons.

Ralph Ayala claims that even though he heard rumors about the decertification petition, he never saw any maintenance employees circulating it. When employees asked him how the decertification petition would affect them, he told them he could have nothing to do with the petition and that they should contact the "labor board."

Brashear denied offering employees a retroactive pay increase after the October 30 ratification vote. He denied telling employees that if they voted the Union out, they would receive retroactive pay increases, a better attendance policy, or even the terms of the rejected contract proposal. He denied threatening employees with the loss of any benefit if they did not vote the Union out. He denied telling employees to sign the decertification petition or to enter the mechanics' area of the facility in order to sign the petition. He claims that he never noticed that the sign barring drivers from the maintenance area had been removed nor heard about it being removed.

C. Union Access to the Maintenance Area

The maintenance area at the Main Street facility consists of repair bays where bus maintenance work is performed; the mechanics' break area, where a bulletin board and the mechanics' timecards are located; and an outdoor "smoking area" immediately outside the back entrance to the facility that both drivers and mechanics use during their breaks. ATC/Vancom's policy forbids any employee other than maintenance personnel from entering the maintenance area apart from the designated smoking area.

Admittedly, Don Kilner, the former Chula Vista general manager, agreed in December 2000 to allow Ahumada access to the mechanics' break area and the adjacent bulletin board/time card area to conduct Union business. Under the verbal agreement, Ahumada was not required to notify anyone or seek permission before entering the area to which he had been given access. At least once a week, Ahumada entered the designated maintenance area to check the mechanics' bulletin board for schedules and bidding processes, or any postings about

changes in employment conditions, and to ensure that all employees shown on the timecard rack were Union members. If mechanics happened to be in the break area, he would occasionally speak with them about work problems or Union issues.

During the first two weeks of November, signs and graffiti disparaging and threatening Ahumada were found posted at the Main Street facility and at the Iris Street Trolley Station. A hand-lettered sign reading "Death to Richie" was found taped to the bathroom wall at the Main Street facility. A posting regarding Union members' cost for recent grievance activity was defaced with writing that read "Vote Union Out Now. No More Richie." Purportedly, Ahumada documented threats made against him and kept copies in the same file that allegedly disappeared from the Union office.

When Mikkelson found graffiti relating to Ahumada on the walls he removed it and notified Ahumada. On two occasions, Mikkelson told Ahumada that, judging by the graffiti and defaced postings, many of the employees were unhappy with him. When Brashear learned about the posted notice that had been defaced with "Death to Richie (Ahumada)," he reported it to the Union president, George Thompson, and to stressed his concern for Ahumada's safety. On other occasions, some of the graffiti was delivered to Thompson at negotiating sessions. However, no evidence suggests that Brashear, or any other Company official, ever advised Thompson, or any other Union official, of an intent to change the conditions of Ahumada's access to the maintenance area prior to November 12.

On November 12, Ahumada walked down the maintenance area hallway to which he normally had access on his way out of the building. Ray Bravo, a mechanic supervisor, stopped Ahumada and told him that he was no longer permitted to enter the shop. Bravo explained that Ralph Ayala had given this directive. Ahumada immediately returned to the drivers' area where he confronted Brashear and Ralph Ayala, both of whom happened to be talking with Matthew Ryan, another Union executive board member. Ahumada demanded to know why he had barred him from the maintenance area. At first, Ayala answered that the reason related to a safety issue. Ahumada dismissed Ayala's response as "bullshit." He asked why the managers allowed mechanics and office personnel to eat lunch in the area if safety was at issue. Ahumada told the managers their refusal to allow him to enter the mechanics' area "wasn't right." Brashear replied that they were not refusing Ahumada access to the maintenance area, but that from now on Ahumada would be required to tell a supervisor if he wanted to speak with a mechanic, and then the supervisor would ask the mechanic if he wanted to speak with Ahumada. Ahumada told Brashear and Ayala that such a policy was illegal and would deny him access to the Union members. He said the employees had the right to speak to a Union representative without being observed by a supervisor.

At Ahumada's insistence, Brashear called then former general manager Kilner to confirm their agreement. Brashear asked Kilner if he had an agreement with Ahumada about access to the maintenance area. Brashear told Kilner that Ralph Ayala no longer wanted Ahumada to enter any part of the maintenance area because his presence posed a safety issue. Kilner acknowledged that they had an agreement but advised Brashear that it was his property now and he could make any kind of rules he wanted. According to Ahumada, Brashear told him after speaking to Kilner that his decision further limiting his access to the maintenance area stood. Ahumada replied that the new policy was illegal and that the Union would probably file a grievance about it.

Brashear's account of the events on November 12 differs considerably from Ahumada's. He claims that Ryan, the other Union executive board member who is not an ATC/Vancom employee, requested access to the maintenance area and he agreed to that. Brashear

summoned maintenance director Ayala to introduce Ryan and to instruct Ayala that Ryan should be given full access to the shop area. As this occurred, Ahumada approached the three of them and started yelling about being denied access to the maintenance area. Brashear told him he would take Ahumada out into the shop right then if he wanted to go, but that he was concerned for Ahumada's safety. As the exchange continued, Brashear claims that he emphasized his concern for Ahumada's safety at least six times. Brashear recalled that Ahumada thought the issue of his safety was an excuse for denying him access.

Because Brashear felt he had an obligation to protect all employees and as he did not feel Ahumada would be safe in the shop, he recommended that Ahumada advise a supervisor before entering the shop area. Although both Brashear and Ahumada place Ayala at the scene of the conversation that occurred after supervisor Bravo denied Ahumada access to the shop, Ayala denied being present and was asked no questions seeking to corroborate Brashear's account or about this subject generally. Bravo did not testify nor was his absence explained. Brashear claims that he discussed this matter with Union president George Thompson. At one point in his testimony, Brashear said that he told Union president Thompson that Ahumada had been barred from the mechanics' shop for safety reasons but he subsequently recanted that statement and denied telling Ahumada that he could not enter the maintenance area.[7] Union agents Thompson and Ryan likewise did not testify.

D. Analysis and Conclusions

1. The 8(a)(1) Allegations

For several reasons, I cannot credit the testimony by Ahumada and Arguilez that Mikkelson told various drivers on several occasions that they would receive retroactive pay or that the number of miss-outs would be increased if they decertified the Union. First, Mikkelson emphatically denied making such a statements and I find it improbable that he would have widely broadcast – as Ahumada and Arguilez claim – positions completely at odds with Respondent's bargaining position. Second, on the first two occasions when Ahumada confronted Mikkelson about making such a promise, Mikkelson denied that he had done so. Third, Haataja, a witness whose testimonial demeanor appeared far superior to that of Ahumada and Arguilez and who was frequently present when Mikkelson spoke to various drivers, corroborated Mikkelson's denial to a certain extent by testifying that he never heard such promises. And fourth, this claim by Ahumada and Arguilez lacks support in their prior statements about this subject.

But the credibility of Ahumada and Arguilez aside, I would still conclude that the General Counsel failed to prove that Mikkelson promised employees retroactive pay and added miss-outs in the post-ratification period by a preponderance of the evidence. Neither Ahumada nor Arguilez claimed to have been present together when Mikkelson allegedly made such promises and the timing of their shifts suggests they were not. Hence, they do not mutually corroborate a particular occasion when Mikkelson allegedly spoke to these points. But they both make clear that numerous other drivers were present when they allegedly overheard Mikkelson speak to these subjects. However, the General Counsel chose not to provide any added corroboration or

[7] Respondent charged that General Counsel's brief misstated Brashear's testimony on this point and moved to strike that portion of the brief. In my judgment, the General Counsel's brief fell within the realm of fair argument. Therefore, I deny the motion to strike. And in the final analysis, I found Brashear's altered testimony, whether it resulted from confusion or not, was of marginal relevance.

explain why added corroboration was not forthcoming especially in the face of such stark contrasts in the accounts by both sides. For this reason, I find that the General Counsel's failed to meet the burden of proving that Mikkelson or any other Company official promised retroactive pay or added miss-outs in the post-ratification period by a preponderance of the evidence. See *Queen of the Valley Hospital*, 316 NLRB 721, fn 1, (1995).

Nor do I find that Respondent somehow suspended its prohibition against drivers entering the maintenance area in order to facilitate the petition signing. Ahumada and Arguilez did not agree on when the sign prohibiting drivers from entering the maintenance area was first removed, nor when it was replaced with a new sign. Ahumada testified that the sign was not replaced until late November or early December, but he later claimed that he took the photograph of the replacement sign in mid-November. In addition, General Counsel failed to provide any straightforward evidence from any witness who either entered the prohibited zone in November or December or who observed a driver enter the mechanics' area in that period. Driver Haataja testified that he signed the petition in the "smoking" area of the maintenance yard, a place never off-limits to drivers. Finally, I find it highly improbable that Ahumada would have said absolutely nothing to management concerning the removal of the sign barring drivers from the mechanics area particularly in view of the ongoing decertification effort among the mechanics at that time. Yet, no evidence gives the slightest indication that he ever spoke to any manager about the missing sign. If, in fact the sign had been missing, I find it highly probable that Ahumada would have pointed this fact out particularly on November 12 when told that he would no longer have access to the maintenance area. Accordingly, even though I find below that Respondent's officials aided the decertification effort, I find the claims that management removed the sign barring drivers from the maintenance area lack merit.

Likewise, Respondent did not violate the Act by telling employees they would not receive retroactive pay if they did not vote the Union out. All parties admit to a clear understanding before the October 30 ratification vote that ATC/Vancom would no longer offer retroactive pay increases if the employees did not ratify the Company's proposal by that date. A majority of employees voted to reject the Company's proposal on October 30 so any subsequent statements that retroactive pay increases would not be forthcoming simply restated Company's position on the subject. Otherwise lawful statements do not become unlawful merely because they have the effect (intended or otherwise) of causing employees to abandon support for the Union. *Lee Lumber & Building Material Corp.*, 306 NLRB 408, 410 (1992). And as I rejected the claim that Respondent told employees they would receive retroactive pay if they voted the Union out, statements that they would not receive retroactive pay if they voted the Union out would not necessarily imply the inverse.

However, I find that Respondent unlawfully aided the employee decertification effort in early November. This aid took the form of statements by Mikkelson denigrating the Union's conduct of the ratification vote, promises to employees that the Company would implement the terms of its final offer (sans the retroactive pay) if they decertified the Union, appeals for employees to trust management without union representation, and repeated suggestions that the drivers contact the mechanics who initiated and circulated the decertification petition. The evidence justifies the conclusion that once the employees collectively rejected Respondent's contract offer, its Chula Vista managers engaged in a protracted effort with individual employees to remove the Union obstacle to the acceptance wages, benefits and other conditions of employment on Respondent's own terms.

Although no evidence establishes management responsibility for initiating the decertification effort, Mikkelson, and to a lesser extent Brashear and Ayala, essentially campaigned for the Union's decertification following the failed ratification vote. As noted,

Mickelson denigrated the Union's performance in arranging for the October 30 ratification vote and urged employees to trust management without union representation. Brashear accused the Union of ripping off employees for the cost of Union dues. Mikkelson acknowledged that he told at least 100 employees that the Company would implement the wages, benefits, and terms and conditions contained in its final contract proposal to the Union if they decertified the Union. Although Mikkelson asserted that he did so only in reply to employee inquiries, his responses ordinarily occurred with groups of employees gathered in the drivers' break room. Undoubtedly, numerous other employees would have overheard his responses whether or not they inquired about the subject.

I find that management implicitly promised the employees during an on-going decertification campaign that they would receive the same benefits previously offered and rejected by a majority of those who voted on October 30 without the cost of Union dues or the intrusion of the Union in any fashion. I find that such a broadly broadcast promise together with the proactive encouragement to decertify would tend to substantially interfere with employee support for union representation. Such a conclusion is particularly warranted where, as here, the rejected contract proposal contained very significant wage increases (40 percent) for the mechanics. Hence, I find it not at all surprising that the impetus for the Union's decertification occurred primarily in the maintenance shop. Management's steady reassurance to employees that they would lose nothing further and, by implication, gain freedom from the cost of Union dues, amounted to a calculated effort designed to encourage employee disaffection among the sizeable minority who favored acceptance of the Company's final offer. Contrary to the contention in Respondent's brief, these activities by the Chula Vista managers far exceeded the type of ministerial aid the Board and courts typically tolerate in decertification campaigns. Accordingly, I find Respondent supported and encouraged the disaffection that followed the ratification vote. Respondent violated Section 8(a)(1) when it accompanied that support and encouragement with the assurance or promise that the terms of its rejected contract offer would be implemented if the employees decertified the Union. *Justrite Manufacturing Co*., 238 NLRB 57, 61 (1978); *Casey Manufacturing Company*, 167 NLRB 89 (1967).[8]

2. The 8(a)(5) Allegation

Ahumada's oral agreement with former General Manager Kilner permitted him access to a limited portion of the maintenance area for the purpose of conducting Union business. Although the agreement never became an actual part of the parties' collective-bargaining agreement, mutual adherence to this agreement for nearly two years created a past practice regarding the Union's representational functions at the Main Street facility. *Keystone Steel & Wire,* 41 F.3d 746, 749 (D.C. Cir. 1994); *Riverside Cement Co*. 296 NLRB 840, 841 (1989). An employer violates Section 8(a)(5) of the Act by unilaterally changing conditions related to a Union representative's access to employees because it is a mandatory subject of bargaining whether embodied in a written agreement or not. *Ernst Home Centers Inc.*, 308 NLRB 848, 849 (1992); *Smyth Manufacturing Co*., 247 NLRB 1139, 1168 (1980); *Granite City Steel Co*., 167

[8] In *Justrite*, the ALJ relied on *South Shore Hospital*, 229 NLRB 363, fn. 1, (1977). Later, the First Circuit refused to enforce that portion of *South Shore* on free speech grounds. *South Shore Hospital v. NLRB*, 571 F.2d 669 (1st Cir. 1978). Thereafter, the court distinguished its *South Shore* holding by noting that the employer made the questioned statement in response to an employee's question before a petition had been filed. *NLRB v. Arrow Elastic Corporation*, 573 F.2d 702 (1st Cir. 1978). I find this case also factually distinguishable from *South Shore*. Management promised to implement here as a part of a broader appeal designed to assist those who sought to abandon union representation while a representation election was pending.

NLRB 310, 315 (1967). This is true even when the Union's representational status is in question due to the pendency of a decertification petition. *NLRB v. Great Western Coca-Cola Bottling Co*., 740 F.2d 398, 404 (5th Cir. 1984).

I find Respondent unilaterally changed the established practice by which Ahumada conducted his representational duties in the maintenance area when Bravo denied Ahumada access to that area altogether and Brashear later conditioned his access on supervisory notice and approval. Ahumada's testimony that Bravo imposed limits on his maintenance area access at Ayala's direction is uncontradicted. The fact that this change may have occurred as Ahumada passed through the area to which he normally has access is not relevant. Brashear's claim that ***he*** never precluded Ahumada from entering the maintenance area begs the question; no evidence shows that he countermanded the limitations imposed by Bravo. In any event, I do not credit Brashear's assertion. Had that been the case, I find it improbable that there would have been a heated discussion about the access issue at the January negotiations. I credit Ahumada's claim that Brashear directed Ahumada utilize a supervisor as an intermediary in determining whether a particular mechanic would be willing to speak with Ahumada.

Respondent relies on *Sacramento Union*, 258 NLRB 1074 (1981), to fashion a contention that even if Brashear did unilaterally change the access agreement, the change would not constitute a departure from past practice that would significantly affect the terms and conditions of employment, and so would not violate Section 8(a)(5). However, the Board in that case rejected the judge's conclusion that the employer's unilateral changes to terms and conditions of employment did not violate the Act because "it does not follow that the simple fact of newness (change) impacts on employees in any appreciable way." *Id*. at 1075. The Board found the changes were made to mandatory subjects of bargaining and did substantially impact the employees. *Id*. at 1075-1076. Union representative access to unit employees is a mandatory subject of bargaining, and any change in an existing access rule substantially affects unit employees. *NLRB v. Great Western Coca-Cola Bottling Co*., above, at 403.

I also find Respondent's reliance on the threatening, anti-Ahumada graffiti that began appearing in early November as a justification for limiting Ahumada's access to the maintenance area suspect for three reasons. First, the graffiti also appeared at the Iris Street station but Respondent's limitations applied only to the maintenance area and at a time when the employees in that area were spearheading the decertification effort.[9] Second, nothing shows Brashear he discussed or proposed measures designed to protect Ahumada's safety when he talked to Thompson about the problem. And third, no evidence shows Respondent made affirmative efforts to stop the graffiti or identify the perpetrators.

For the foregoing reasons, I find Respondent violated Section 8(a)(1) and (5) by unilaterally imposing limitations on Ahumada's access to the maintenance area.[10]

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[9] In its brief, Respondent incorrectly asserted that the Company had not been made aware of the anti-Ahumada graffiti at the Iris Street Station. On the contrary, Ahumada testified that he told the Company about the graffiti at that location (TR 116: 13-20) and I credit that testimony.

[10] I reject Respondent's request for an adverse inference under *Bannon Mills*, 146 NLRB 611 (1964), concerning this and other issues because the Union failed to produce subpoenaed documents. I have no reason to doubt the Union counsel's explanation that the Union produced what its current agents found and were rebuffed by an uncooperative, former financial secretary in their efforts to secure the rest of the materials, or information as to their location. As Respondent apparently made no effort to subpoena that individual, I find the application of the adverse inference rule would not be appropriate here.

Conclusions of Law

1. Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by promising employees the wages, benefits, and terms and conditions of employment in its 2002 last best offer in order to encourage its employees to decertify the Union.

2. Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act by unilaterally changing the established practice that permitted access to the maintenance area of its Main Street facility by a Union agent in order to conduct Union business.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, ATC/Vancom, Chula Vista, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees the wages, benefits, and terms and conditions of employment contained in its last best offer if the employees decertified the San Diego Bus Drivers Union, Local 1309, Amalgamated Transit Union, ALF–CIO, CLC (Union).

(b) Denying or conditioning the Union's designated agent access to the maintenance area at its Main Street facility as agreed in December 2000 without providing the Union with notice and an opportunity to bargain over any changes regarding access.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, notify the Union in writing that it has rescinded the changes made on November 12, 2002, to the December 2000 agreement with the Union that provides Union agents access to the maintenance area in order to conduct Union business.

[11] Absent exceptions as provided by Section 102.46 of the Board's Rules and Regulations, the Board, as provided in Section 102.48 of the Rules, will adopt the findings, conclusions, and recommended Order, and all objections to them will be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at its facility in Chula Vista, California, copies of the attached Notice marked "Appendix."[12] Copies of the Notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since December 4, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: April 30, 2004, at San Francisco, CA.

_____
William L. Schmidt
Administrative Law Judge

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT promise you that we will put the wages, benefits, and terms and conditions of employment contained in our last best offer into effect in order to encourage you to decertify the San Diego Bus Drivers Union, Local 1309, Amalgamated Transit Union, ALF–CIO, CLC (Union).

WE WILL NOT deny or condition access to maintenance area by a Union agent in accord with the agreement reached in December 2000 without providing the Union with notice and an opportunity to bargain about any changes regarding access.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Union in writing that we have rescinded the change made on November 12, 2002, in the agreement we have with the Union that provides Union agents access to the maintenance area to conduct Union business.

ATC/VANCOM
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5229.